

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH BELLINO,

Plaintiff,

-against-

HOME DEPOT U.S.A., INC. d/b/a HOME DEPOT,

Defendant.

Civil Action No.:
08-CV-4971 (CM)(JCF)

ANSWER

McMahon, J.
Francis, M.J.

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Defendant, HOME DEPOT U.S.A., INC. d/b/a ("Home Depot"), by its attorneys, Simmons, Jannace & Stagg, L.L.P., as and for its Answer to the Complaint of plaintiff, responds as follows:

1. Denies the allegations contained in numbered paragraph "1" of the Complaint.

2. Denies in the form alleged the allegations contained in numbered paragraph "2" of the Complaint except admits Home Depot was a foreign corporation.

3. Denies in the form alleged the allegations contained in numbered paragraph "3" of the Complaint except admits Home Depot was a foreign corporation.

4. Denies in the form alleged the allegations contained in numbered paragraph "4" of the Complaint and leaves all questions of law to the Court.

5. Denies in the form alleged the allegations contained in numbered paragraph "5" of the Complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in numbered paragraph "6" of the Complaint.

7. Denies in the form alleged the allegations contained in numbered paragraph "7" of the Complaint and leaves all questions of law to the Court.

8. Denies in the form alleged the allegations contained in numbered paragraph "8" of the Complaint and leaves all questions of law to the Court.

9. Denies in the form alleged the allegations contained in numbered paragraph "9" of the Complaint and leaves all questions of law to the Court.

10. Denies in the form alleged the allegations contained in numbered paragraph "10" of the Complaint and leaves all questions of law to the Court.

11. Denies in the form alleged the allegations contained in numbered paragraph "11" of the Complaint and leaves all questions of law to the Court.

12. Denies in the form alleged the allegations contained in numbered paragraph "12" of the Complaint and leaves all questions of law to the Court.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in numbered paragraph "13" of the Complaint.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in numbered paragraph "14" of the Complaint.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in numbered paragraph "15" of the Complaint.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in numbered paragraph "16" of the Complaint.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in numbered paragraph "17" of the Complaint.

18. Denies in the form alleged the allegations contained in numbered paragraph "18" of the Complaint and leaves all questions of law to the Court.

19. Denies in the form alleged the allegations contained in numbered paragraph "19" of the Complaint and leaves all questions of law to the Court.

20. Denies in the form alleged the allegations contained in numbered paragraph "20" of the Complaint and leaves all questions of law to the Court.

21. Denies in the form alleged the allegations contained in numbered paragraph "21" of the Complaint and leaves all questions of law to the Court.

22. Denies in the form alleged the allegations contained in numbered paragraph "22" of the Complaint and leaves all questions of law to the Court.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in numbered paragraph "23" of the Complaint.

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in numbered paragraph "24" of the Complaint.

25. Denies the allegations contained in numbered paragraph "25" of the Complaint.

26. Denies the allegations contained in numbered paragraph "26" of the Complaint.

27. Denies the allegations contained in numbered paragraph "27" of the Complaint.

28. Denies the allegations contained in numbered paragraph "28" of the Complaint.

29. Denies the allegations contained in numbered paragraph "29" of the Complaint.

30. Denies the allegations contained in numbered paragraph "30" of the Complaint.

31. Denies the allegations contained in numbered paragraph "31" of the Complaint.

32. Denies the allegations contained in numbered paragraph "32" of the Complaint.

33. Denies the allegations contained in numbered paragraph "33" of the Complaint.

34. Denies plaintiff is entitled to the relief requested in the "WHEREFORE Clause."

35. Defendant demands that liability, if any, be apportioned.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

36. Plaintiff's Complaint fails to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

37. Upon information and belief, the injuries allegedly sustained by plaintiff were not as a result of any culpable conduct by the defendant herein, or in the alternative, the amount of plaintiff's negligence was greater than that of defendant's and plaintiff shall be barred from recovery.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

38. Upon information and belief, any damages sustained by plaintiff were caused, in whole or in part, by the culpable conduct of plaintiff and/or were aggravated by the culpable conduct of plaintiff.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

39. If plaintiff proves at trial the existence of a dangerous condition, all of which is denied, upon information and belief, any damages sustained by plaintiff were caused by plaintiff's having voluntarily and unreasonably assumed a known and dangerous risk, and/or the damages were caused by or aggravated by such conduct.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

40. This defendant will rely upon the provisions of Article 16 of the CPLR with regard to the limitation of joint and several liability.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

41. Upon information and belief, defendant never received actual or constructive notice of any defective or dangerous condition, and therefore, it cannot be liable for any alleged injuries suffered by plaintiff.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

42. Upon information and belief, if plaintiff suffered any damages as alleged in the Complaint, such damages were as a result of an independent superseding act by a third party for which defendant cannot be held liable, and defendant's conduct was in no way the proximate cause of such damages.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

43. If plaintiff suffered damages as alleged, then plaintiff failed to mitigate such damages.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

44. If plaintiff herein has received remuneration and/or compensation for some or all of his claimed economic loss, or will with reasonable certainty receive remuneration and/or compensation for said loss in the future, this defendant is entitled to have plaintiff's award, if any, reduced by the amount of said

remuneration and/or compensation, pursuant to Section 4545(c) of the CPLR.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

45. Upon information and belief, any damages sustained by the plaintiff were caused, in whole or in part, by an unavoidable accident, which was not intended and could not have been foreseen or prevented by the exercise of reasonable care.

WHEREFORE, for all of the foregoing reasons, it is respectfully requested that plaintiff's Complaint be dismissed in its entirety, and that defendant be awarded the costs and disbursements of this action, reasonable attorney's fees, and such other and further relief as this Court may deem just and proper.

Dated: Syosset, New York
June 3, 2008

Yours, etc.,

SIMMONS, JANNACE & STAGG, L.L.P.

By: /s/ Allison C. Leibowitz
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Answer